

8-2402-8175-2

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF PEACE OFFICERS STANDARDS AND TRAINING

In the Matter of a Disciplinary  
Hearing Regarding the Peace Officer  
License of Darrin P. Waletzki  
ORDER ON MOTION FOR DISMISSAL

By written motion dated April 13, 1994, the peace officer in the above-captioned matter, Darrin P. Waletzki (Officer Waletzki or Respondent), sought an order of the Administrative Law Judge recommending to the POST Board a dismissal of the pending disciplinary charges against his peace officer's license. On April 27, 1994, the POST Board and the Respondent filed initial simultaneous written briefs. Simultaneous reply briefs were filed with the Administrative Law Judge on May 25, 1994. On that date, the record on the motion closed.

Appearances: Ann E. Walther, Gregg M. Corwin & Associates, Attorneys at Law, 508 East Parkdale Plaza Building, 1660 South Highway 100, St. Louis Park, Minnesota 55416-1534, appeared on behalf of the Respondent, Darrin P. Waletzki; and John Docherty, Assistant Attorney General, Suite 1400, 445 Minnesota Street, St. Paul, Minnesota and Mary J. Theisen, Assistant Attorney General, Suite 1400, NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2131, appeared on behalf of the Minnesota Board of Peace Officer Standards and Training.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, the final decision of the Board shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Board. Exceptions to this Report, if any, shall be filed with the Board at 200 Spruce Tree Center, 1600 University Avenue, St. Paul, Minnesota 55104-3825. Pursuant to Minn. Stat. § 214.10, subd. 2, a board member who was consulted during the course of an investigation may participate at the hearing, but may not vote on any matter pertaining to the case.

Based on the motion, the written submissions of counsel and on all the files and records herein, the Administrative Law Judge makes the following:

RECOMMENDED ORDER

The motion of the Respondent, Darrin P. Waletzki, to dismiss the proposed sanctions against his peace officer's license is appropriately GRANTED.

Dated this \_\_\_\_ day of June, 1994.

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JON L. LUNDE  
Administrative Law Judge

Reported: No Hearing Held.

#### NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

#### MEMORANDUM

The Respondent, Darrin P. Waletzki, has moved the Administrative Law Judge for an Order determining that the charges contained in the complaint filed by the Board of Peace Officer Standards and Training Complaint Investigation Committee does not state a ground for taking sanctions against his peace officer's license under Minn. Rules, pt. 6700.1600 B (1991), or Minn. Stat. § 609.066 (1992). The Respondent has styled his motion as one for dismissal. The Administrative Law Judge believes that consideration of the motion is appropriate under Rule 12.02 of the Minnesota Rules of Civil Procedure if under the uncontested facts presented, the Board has no jurisdiction to grant relief or take action against the Respondent's peace officer's license.

Dismissal for failure to state a claim for which relief can be granted is appropriate when it is apparent from the face of the complaint that the requested legal remedy is not available. See, e.g., Pederson\_v.\_American Lutheran\_Church,

For purposes of this motion, the Administrative Law Judge assumes the truth of the facts hereinafter stated. Mr. Darrin P. Waletzki holds peace officer license number 11281. Mr. Waletzki was appointed as a peace officer in Minneapolis, Minnesota on December 29, 1991. On the night of December 15, 1992, at about midnight, Darrin Waletzki, while in the company of an additional individual, discharged a handgun several times in a Mall of America parking

ramp. An undetermined number of shots were fired towards the floor of the parking ramp. At least four shell casings were recovered. It is undisputed that Mr. Waletzki was not on duty as a police officer at the time the shots were fired. Reply\_Brief\_of\_the\_Minnesota\_Board\_of\_Peace\_Officer\_Standards\_and\_Training, p. 1. It is also undisputed that Officer Waletzki was

not attempting to act as a peace officer at the time the shots were fired in that he was not attempting to arrest any suspect, prevent the commission of a crime, or prevent the escape of a captured suspect. Officer Waletzki was severely intoxicated and fired his pistol in the parking ramp as a response to having been earlier ejected from a drinking establishment in the Mall.

For the reasons hereinafter discussed, the Administrative Law Judge determines that Minn. Stat. § 609.066 (1992), and Minn. Rules, pt. 6700.1600 B

(1991) apply only to a peace officer who is attempting to act as such, while either on duty or off duty, in affecting an arrest, preventing the commission of a crime or preventing the escape of an arrested individual. Because it is undisputed that Officer Waletzki's conduct did not occur while he was attempting to act as a peace officer, dismissal of the Complaint is appropriate.

The Complaint of the Investigation Committee charges that Officer Waletzki violated Minn. Stat. § 609.066 (1992), and Minn. Rules, pt. 6700.1600«B (1991), when he fired shots into the floor of a Mall of America parking ramp on December 15-16, 1992. Minn. Stat. § 609.066 (1992), provides:

Authorized use of deadly force by peace officers.

Subdivision 1. Deadly force defined. For the purposes of this«section, "deadly force" means force which the actor uses«with the purpose of causing, or which the actor should reasonably know creates a substantial risk of causing, death or«great bodily harm. The intentional discharge of a firearm in the direction of another person, or at a vehicle in which another person is believed to be, constitutes deadly force.

Subd. 2. Use of deadly force. Notwithstanding the provisions«of section 609.06 or 609.065, the use of deadly force by a peace officer in the line of duty is justified only«when necessary:

- (1) to protect the peace officer or another from apparent death«or bodily harm;
- (2) to effect the arrest or capture, or prevent the escape,«of«a person whom the peace officer knows or has reasonable grounds to believe has committed or attempted to commit a felony involving the threatened use of deadly force; or
- (3) to effect the arrest or capture, or prevent the escape, of«a person whom the officer knows or has reasonable grounds to believe has committed or attempted to commit a

felony if the officer reasonably believes that the person will cause death or great bodily harm if that person's apprehension is delayed.

Subd. 3. [No defense in civil actions.] This section and section 609.06, 609.065 and 629.33 may not be used as a defense in a civil action brought by an innocent third party.

It is admitted by the POST Board that Officer Waletzki did not violate subdivision 2 of section 609.066 in that he was not acting "in the line of duty" as required by subdivi

Eighteen others [states] allow, in slightly varying language, «the use of«deadly force only if a suspect has«committed a felony involving the use or threat of«physical«or deadly force, or is«escaping with a deadly«weapon, or is likely to endanger life«or inflict«serious«physical injury if not arrested.18

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18 . . . Minn. Stat. § 609.066 (1984).

The Administrative Law Judge also agrees with the statement of the Respondent regarding the legislative history of Minn. Stat. § 609.066 (1992), and the reason for the adoption of the statute. Respondent\_Licensee\_Waletzki's Memorandum\_in\_Support\_of\_Motion\_to\_Dismiss, pp. 8-11. The Administrative Law Judge does differ, in one respect, from the interpretation of Minn. Stat. § 609.066 (1992), offered by the Respondent. The Administrative Law Judge believes that the section could possibly apply to off-duty conduct by a peace officer in attempting to effectuate an arrest, prevent a crime, or prevent the escape of a suspect. While that matter may be open to some dispute, it is entirely clear to the Administrative Law Judge that Minn. Stat. § 609.066 (1992), by its legislative history and express terms, does not apply to off-duty conduct by a peace officer in which he or she is not attempting to act as a peace officer in making an arrest, preventing a crime, or preventing the fleeing of a suspect.

That does not, however, end the inquiry. Irrespective of the limiting comment made by committee counsel before the disciplinary committee, the Complaint also charges Officer Waletski with a violation of Minn. Rules, pt. 6700.1600 B (1991). A violation of that rule was charged in the Complaint and in the Notice and Order for Hearing. Minn. Rules, pt. 6700.1600 (1991), provides, in part:

Violations of the following standards of conduct by a licensee shall be grounds for revocation, suspension, or nonrenewal of license:

\* \* \*

B. the use of deadly force when not authorized by Minnesota Statutes, section 609.066; . . .

It is, apparently, the position of the POST Board that conduct by a person who is also licensed as a peace officer outside of the line of duty which creates a risk of bodily harm to another party violates the rule in that it is a use of deadly force which is not permitted or specifically authorized by Minn. Stat. § 609.066, subd. 2 (1992). For the reasons hereinafter discussed, the Administrative Law Judge believes that Minn. Rules, pt. 6700.1600 B (1991), must be read in accordance with the statute, as applying only to a peace officer while he or she is attempting to act as such while either officially on duty or off duty in attempting to effectuate an arrest, prevent the commission of a crime, or prevent the escape of a person arrested. With respect to any other off-duty conduct which creates a danger of death or serious bodily harm to another person as a result of activity by the actor outside of such circumstances, a sanction against a peace officer's license is authorized by rule only if the conduct amounts to a felony. Minn. Rules, pt. 6700.1600 A (1991).

The dispositive issue, then, is whether the phrase "the use of deadly force" as contained in Minn. Rules, pt. 6700.1600 B (1991), includes any conduct dangerous to human life and safety or refers only to actions by a peace officer attempting to act as such, whether on or off duty, to effect an arrest, prevent a crime, or prevent the fleeing of a suspect. Minn. Stat. § 645.08(1) (1992), provides:

Words and phrases are construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a special meaning, or are defined in this chapter, are construed according to such special meaning or their definition. .

The same canon of construction applies to the interpretation of a rule. Minn. Stat. § 645.001 (1992). The Administrative Law Judge believes that the phrase "use of deadly force" has acquired a special meaning and unless specifically qualified, refers to conduct by a peace officer attempting to act as such in effectuating an arrest, preventing the commission of a crime, or preventing the escape of an apprehended subject.

In *Johnson v. Morris*, 453 N.W.2d 31, 38 (Minn. 1990), the court adopts the Model Penal Code definition of deadly force. The court also notes that the United States Supreme Court has adopted for Fourth Amendment analysis purposes and for purposes of 42 U.S.C. § 1093 the Model Penal Code's rule as to permissible use of deadly force. That Model Penal Code provision, however, is specifically limited to the use of deadly force by a peace officer attempting

to act as such in either arresting an individual, preventing a crime, or preventing escape from custody. See, ULA, Model Penal Code § 3.07 (1974). That is the definition of the use of deadly force also largely adopted by the United States Supreme Court in *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 1699 (1985). The Restatement of Torts Second, in section 131 (1965), when commenting on the use of force intended or likely to cause death, deadly force, likewise limits the use of such force to a situation in which a privileged arrest is made. In comment C to section 131, the author states:

This section states the rule which determines the existence of «a privilege to use force intended or likely to cause death» for the purpose of affecting any arrest which is privileged.

ALI, *Restatement of Torts Second*, 234 (1965). Other comments to the Restatement of Torts Second also specifically limit the phrase "use of deadly force" to a situation in which a peace officer or a private person is attempting to effectuate an arrest, prevent a crime, or prevent a suspect from fleeing. A review of the legal literature on the subject also affirmatively discloses that the sole context in which the phrase "use of deadly force" occurs with respect to a peace officer is in a situation similar to that previously discussed, that is, where a peace officer, on or off duty, is attempting to effectuate an arrest, prevent the commission of a crime, or prevent a suspect from fleeing. Annotation, *Deadly Force in Arrest of Fleeing Felon*, 83 ALR3d 174, 176-77 (1978), states:

This annotation, without attempting to be exhaustive, collects «and analyzes illustrative civil and criminal cases» defining the modern status of the rules governing a «peace officer's right to use deadly force in arresting or «attempting to arrest a fleeing felon.

Annotation, *Arrest of Misdemeanant -- Intentional Force*, 83 ALR3d 238, 241 (1978), states:

This annotation collects and analyzes the cases in which a civil action was initiated against a peace officer to recover «damages for death or personal injuries caused by the «officer's use of intentional force in arresting or attempting to arrest a person suspected of having committed a «misdemeanor.

Similarly, at page 243 of the same annotation, the following statement is made:

The basic rule governing the conduct of a peace officer in making an arrest is that he may use whatever force is necessary «to effect the arrest, but he may not use excessive force. This rule is, of course, generally applicable to the arrest involving misdemeanants. However, despite the broad implications of such rule, it has been universally held that a «peace officer may not use deadly force against a fleeing misdemeanor even though such force is necessary to prevent the «suspect's escape.

A review of both annotations and all of the commentary cited in the annotations

uniformly discloses t

The Board admits that every case in Minnesota dealing with Minn. Stat. P«609.066 (1992) and the applicable rule relate to a peace officer acting as such. That is no mere coincidence: it results from the limited scope of the statute and rule. If the construction of the statute and rule advocated by the Disciplinary Committee is adopted, there would always be grounds for sanctions against a peace officer's license when he or she used deadly force off-duty in self defense or other legally recognized justified situations.

The committee argues that Officer Waletzki's conduct might have endangered other persons and characterizes the construction of the rule and statute suggested by the Respondent as sanctioning dangerous conduct. That certainly is not the intention of the Administrative Law Judge. The criminal conduct of Officer Waletzki might, if appropriate, have been charged as a felony and so prosecuted. It was not. The City of Minneapolis, under their Civil Service Code, could have discharged Officer Waletzki for his conduct. It did not do so. The only issue before the Administrative Law Judge is the proper construction of Minn. Rules, pt. 6700.1600 B (1991). The Board, in its rules, has stated that it does not intend or wish to review civil service determinations on discipline by other police departments. Minn. Rules, pt. 6700.1500 (1991). The Board's apparent dissatisfaction with the resolution of the disciplinary proceeding against Officer Waletzki by the City of Minneapolis does not provide a basis for enlarging the application of Minn. Rules, pt. 6700.1600 B (1991).

The Administrative Law Judge determines that Minn. Rules, pt. 6700.1600 B (1991), applies only when a peace officer is attempting to act as such, in effectuating an arrest, preventing the commission of a crime, or preventing a suspect from fleeing. When private conduct is involved in which the peace officer is not attempting to act as a peace officer, Minn. Rules, pt. 6700.1600 A (1991), which relates to conviction for a felony offense, applies. That provision does not apply to Officer Waletzki's conduct. It is undisputed that Officer Waletzki was charged with a misdemeanor violation involving reckless discharge of a weapon. After a plea of guilty and after satisfactory completion of the requirements of his stayed sentence, Officer Waletzki's plea was vacated and the matter was dismissed on motion of the prosecutor. Memorandum\_in\_Opposition\_to\_Motion\_to\_Dismiss\_and\_in\_Support\_of\_Jurisdiction\_of POST\_Board, p. 5.

JLL